

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JESUS LOPEZ

Claimant

VS.

IBP, INC.

Respondent,
Self-Insured

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Docket No. 234,115

ORDER

Claimant appealed the October 10, 2002 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on April 2, 2003. Jeffrey K. Cooper of Topeka, Kansas, was appointed Board Member pro tem to serve in place of Board Member Gary M. Korte, who recused himself from this claim. Stacy Parkinson of Olathe, Kansas, was appointed Board Member pro tem to serve in place of Board Member Gary M. Peterson, who retired from the Board on March 31, 2003.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

In the Application for Hearing filed with the Division of Workers Compensation in June 1998, claimant alleged that he had injured both upper extremities in a series of micro-traumas commencing in June 1996 but that on May 6, 1998, he sustained an identifiable accident while working for respondent.

In the October 10, 2002 Award, Judge Avery determined claimant had failed to prove that he sustained personal injury by accident arising out of and in the course of employment with respondent. Consequently, the Judge denied claimant's request for benefits.

Claimant contends Judge Avery erred and requests the Board to grant him benefits for no less than a 34.5 percent functional impairment to the left upper extremity.

Conversely, respondent argues that the Award should be affirmed as claimant provided inconsistent histories of the alleged accident. In the alternative, respondent argues that claimant at most sustained an additional 18.5 percent functional impairment to the left upper extremity.

The only issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?
2. If so, what is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

The Award should be modified to grant claimant benefits for an additional 13 percent permanent functional impairment to the left upper extremity at the level of the elbow.

The Board agrees with the Judge that claimant's history of injury is inconsistent. The Board, however, finds that the history of the symptoms that claimant initially provided is the most accurate.

On May 6, 1998, claimant reported to respondent that he had symptoms in his left hand and wrist. On May 7, 1998, claimant saw Dr. J. Rob Hutchison and reported that he had changed jobs in respondent's meat packing plant about a month before and that his wrist began hurting more. Claimant saw Dr. Hutchison on May 21, 1998, and reported that he did not have any specific accident but that his wrist had been hurting for about six months. On June 4, 1998, claimant saw Dr. Quinn and told that doctor that he had experienced left wrist pain for eight or nine months. Then on June 25, 1998, claimant saw Dr. Dana R. Towle and provided a history of doing a lot of pulling and experiencing pain in his left wrist.

Moreover, when claimant testified at the November 6, 1998 preliminary hearing, claimant provided a history of left hand and wrist symptoms that had gradually progressed as he continued to work. Claimant also testified that he believed that he had broken his wrist working at a table pulling intestines but he was not certain when.

At the April 2002 regular hearing, claimant testified that he had experienced swelling in his left wrist for approximately two months before reporting the injury and that the symptoms began gradually and had progressively worsened.

The Board finds the initial history of claimant's symptoms is the most accurate. Consequently, the Board finds claimant had progressively worsening symptoms in his left hand and wrist that were exacerbated when he transferred to a different job several weeks before May 6, 1998, when he first reported his symptoms to the company nurse. The Board concludes that claimant sustained personal injury by accident arising out of and in the course of employment with respondent.

Claimant received medical treatment from hand surgeon Dr. Towle, who diagnosed a fracture in claimant's left wrist that appeared to be old. In December 1998, the doctor performed a bone graft on claimant's left wrist. In August 1999, the doctor performed a second operation on claimant's left wrist as he did not believe the graft was healing. But when the doctor opened claimant's wrist, the bone appeared solid and the doctor did not perform a second graft. In July 2000, Dr. Towle rated claimant as having a 20 percent functional impairment to the left upper extremity under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.).

At his attorney's request, in April 2001 claimant saw Dr. Pedro A. Murati to be evaluated. Dr. Murati found claimant had a 22 percent impairment to the left upper extremity and a five percent impairment to the right upper extremity, which he determined was injured while overcompensating for the left. Dr. Murati believed claimant's left hand and wrist were asymptomatic before May 6, 1998, when claimant allegedly caught his left arm in a conveyor belt at work.

The Judge requested Dr. Lynn D. Ketchum, another hand surgeon, to evaluate claimant. The doctor saw claimant in September 2001. The doctor determined claimant had either a 20 or 24.5 percent functional impairment to the left upper extremity at the level of the elbow under the AMA Guides (4th ed.). The doctor also concluded that based upon the x-ray findings claimant had between a six percent and 12 percent impairment to the left upper extremity due to the old fracture in the left hand and wrist, which the doctor believed had existed since claimant's teenage years or early 20s. That is the only opinion in the record regarding the extent of claimant's preexisting functional impairment. According to Dr. Ketchum, claimant's new injury added at least 14 percent to the permanent impairment in the left upper extremity.

Weighing the various medical opinions, the Board averages the functional impairment ratings to the left upper extremity from the three doctors and finds that claimant now has a 22 percent functional impairment to the left upper extremity. But the Board also finds that based upon Dr. Ketchum's testimony, claimant had a nine percent functional impairment to the left upper extremity before this work-related accident due to the old

fracture in his wrist. Consequently, claimant is entitled to receive benefits for an additional 13 percent functional impairment to the left upper extremity at the level of the elbow.

The Board concludes that claimant has failed to prove that he sustained permanent injury to the right upper extremity by reason of a work-related injury.

The Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the October 10, 2002 Award and grants claimant permanent disability benefits for a 13 percent functional impairment to the left upper extremity at the level of the elbow.

Jesus Lopez is granted compensation from IBP, Inc., for a May 6, 1998 accident and resulting disability. Based upon an average weekly wage of \$420.60, Mr. Lopez is entitled to receive .86 weeks of temporary total disability benefits at \$280.41 per week, or \$241.15, plus 27.19 weeks of permanent partial disability benefits at \$280.41 per week, or \$7,624.35, for a 13 percent permanent partial disability, making a total award of \$7,865.50, which is all due and owing less any amounts previously paid.

Claimant is entitled to unauthorized medical benefits up to the statutory maximum.

Claimant is entitled to payment of the authorized medical benefits.

Future medical benefits may be considered upon proper application to the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

JESUS LOPEZ

DOCKET NO. 234,115

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Director, Division of Workers Compensation